DEPARTMENT
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Senators and the Senate

On 26 November, Senator Anning informed the Senate of his status as an independent Senator (again: see Bulletin 326), following an apparent separation from (Bob) Katter's Australia Party.

After an exchange on 27 November in which other senators were required to withdraw words ruled objectionable by the President, the Leader of the Australian Greens was suspended from the Senate for declining to do so. The matter was reported to the Senate in accordance with standing order 203, Infringement of order. In these circumstances, it is a question for the Senate whether a senator should be suspended (initially, for the remainder of the sitting day). The Senate voted to do so, on the motion of the duty minister.

The President and several other senators made statements about the matter immediately after the vote, and at the start of the next day's sittings. The President referred to the increasingly combative nature of the formal business process, and asked the Deputy President and the Procedure Committee to bring forward a temporary order to prohibit debate on procedural motions to suspend standing orders at that time. Such an order was proposed in the committee's fourth report of 2018 and adopted later that day. The initial exchange also prompted the Australian Greens to revive their proposal for a mandatory parliamentary code of conduct, and it was again referred to the Procedure Committee on 29 November. Another reference to that committee on 4 December asked it to consider what steps may be taken to reduce the time spent on formal business.

On 29 November, the Senate agreed to its days of meeting and estimates schedule for 2019, with the Budget to be handed down on 2 April, the second sitting week of the year. The Opposition initiated amendments to the government's proposed timetable to ensure that Budget estimates hearings occurred immediately after the Budget.

On 3 December 2018 senators accompanied the President to Government House to present to His Excellency the Governor-General the Senate's address-in-reply to the speech he made in opening the 45th Parliament on 30 August 2016.

The powers of joint committees and 'Privilege!'

The power of a joint committee to summon witnesses was affirmed in the High Court on 22 November, in a judgment that also reaffirmed the validity of the Parliament's contempt powers and noted the extensive protections afforded witnesses before committees through the Senate's Privilege Resolutions.

The Joint Committee on Corporations and Financial Services had ordered the attendance of two witnesses before its franchising inquiry, after they had declined invitations to appear. Those witnesses sought to challenge the committee's capacity to make those orders and applied for a stay or injunction

– the precise relief sought was unclear – to restrain their operation. Her Honour Gordon J found that the witnesses' application lacked merit, and that the issues raised 'should generally be resolved by the Parliament, not the courts'.

From time-to-time there has been conjecture about the powers of joint committees. Odgers' Australian Senate Practice notes:

> The Constitution does not mention joint committees and, by referring in section 49 to the powers, privileges and immunities of each House, may exclude joint committees from the inheritance of the powers, privileges and immunities provided by that section. [14th ed., p.490]

The Parliament has long been alive to this concern, and now generally provides for the powers and procedures of joint committees through a combination of statutory provisions and procedural resolutions. Of particular importance, joint committees are subsumed in the definition of ***committee*** in the *Parliamentary Privileges Act 1987*, dispelling any doubt about the protection of their proceedings before courts and tribunals.

In dismissing the interlocutory application, Her Honour set out the constitutional, legislative and procedural bases of the committee's powers, finding:

> Where, as here, there is an apparently validly appointed joint committee. . .which has a power to direct a person to attend, it is difficult to identify a role for the courts in relation to that exercise of power.

The witnesses later appeared before the committee, as required, apparently armed with advice that parliamentary privilege may not apply to the committee's proceedings, but could be invoked by incanting the word 'privilege' before each response. Thus was the word uttered 422 times in a three and a half hour hearing. There is no magic in the word. As noted above, it is clear that privilege applies to proceedings of joint committees. However, if it did not, the incantation would be to no avail.

Privilege and intrusive powers

The Senate has had a focus on the seizure of material connected to its proceedings throughout this Parliament, since the AFP executed search warrants in the investigation of an alleged leak from NBN in May and August during the 2016 election period.

As background, at the Commonwealth level, the protection of parliamentary material from seizure under search warrant is governed by an MOU between the Parliament and the Executive signed in 2005. The scope of that protection, and the means by which it is secured, are set out in an AFP National Guideline for the execution of search warrants where parliamentary privilege may be involved. The NBN matter was dealt with in the 163rd and 164th reports of the Senate Privileges Committee, which identified shortcomings in the National Guideline. These were examined in a subsequent inquiry, whose main focus was the covert use of intrusive powers. The committee expressed a view that, where information which might attract privilege is seized or accessed, law enforcement and intelligence agencies should follow processes that enable claims of privilege to be raised and resolved prior to the information being interrogated: see 168th report, paragraphs 3.24 to 3.27.

There were several connected developments during the fortnight, beginning with a report on a second search warrant matter.

On 26 November, the Privileges Committee reported to the Senate on the disposition of documents seized by the AFP under warrant on 11 October 2018 (see Bulletin 329). The committee found that the documents satisfied the test it had developed in the NBN matter, and warranted protection as 'proceedings in parliament'. On the same day, the Senate adopted the committee's recommendation that the documents be withheld from the AFP investigation and provided to the senator who had made the privilege claim. The committee expressed concerns about the scope of the warrants, which named a Senate committee and one of its inquiries, as well as aspects of their execution. The committee determined that it should call the AFP Commissioner and other officers to provide further evidence and clarification on these matters, which is expected to lead to a further report in due course.

On the final sitting day, the Senate passed a resolution requiring executive agencies 'to observe the rights of the Senate, its committees and members in determining whether and how to exercise their powers in matters which might engage questions of privilege' and calling on the Attorney-General to work with the Presiding Officers 'to develop a new protocol for the execution of search warrants and the use by executive agencies of other intrusive powers, which complies with the principles and addresses the shortcomings identified' in recent reports of the Parliament's Privileges Committees. The Leader of the Opposition moved the motion and noted that it had been passed unanimously by the Senate.

The intersection between privilege and intrusive powers was also raised by the President of the Senate in a submission to the PJCIS inquiry into the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018. The President noted that, although the bill did not deal with privilege directly, it sat 'in tension with work being undertaken across the Parliament to properly secure privilege against the exercise of executive investigative powers'. Among other things, the bill extends the covert use of investigative powers by intelligence and law enforcement agencies, through computer access warrants and warrants to secure remote access to devices. Where such approaches are used, there is no trigger for parliamentarians to raise claims of privilege, and no clear path for resolving claims if they are made. When the bill was considered on 6 December, the President tabled a response from the Attorney-General and Acting Minister for Home Affairs, indicating that the government would 'give serious consideration' to the procedures governing the exercise of the relevant powers, and work collaboratively with the Parliament to 'better address the intersection between parliamentary privileges and lawful access to modern communications.'

Legislation

Numerous government bills were passed during the fortnight, some with government amendments, one with opposition amendments and one – the Home Affairs Legislation Amendment (Miscellaneous Matters) Bill 2018 – with amendments co-sponsored by two crossbench senators. Consideration of that bill demonstrates the principle that the control of bills is a matter for the Senate, so that a government bill may be brought on by a non-government majority: see Odgers', 14th ed., p350.

The Access and Assistance bill establishes frameworks for industry assistance to law enforcement and intelligence agencies in relation to encryption technologies, extends the powers of law enforcement and intelligence agencies to obtain covert computer access warrants and to collect evidence from electronic devices under warrant remotely, and enables ASIO to require a person with knowledge of a computer or a computer system to provide assistance that is reasonable and necessary to gain access to data on a device that is subject to an ASIO warrant. The final stages of the PJCIS inquiry into the bill were reportedly rushed so that the bill could be dealt with before the parliament adjourned for the year. Its report on the evening of 5 December made 17 recommendations, 173 government amendments

were passed in the House the following morning, and the bill passed the Senate without further amendment that evening. Additional opposition amendments circulated in the Senate did not proceed. The amendments made by the bill were referred back to the PJCIS for review by 3 April 2019, while the resultant Act was assented to on 8 December and commenced operation the following day.

The Access and Assistance bill, the Home Affairs bill and several others were considered in the Senate under a limitation of debate (see below).

Among the other government bills passed by the Senate was a bill to strengthen protections for corporate and financial sector whistleblowers, the catalyst for which may be found in amendments to the Fair Work (Registered Organisations) Amendment Bill 2016 and an undertaking given by the government to former Senator Nick Xenophon in November 2016 to consider implementing the same level of protection across the corporate and public sectors. The bill is yet to be considered by the House.

The Senate also agreed, without debate, not to insist on its amendments to the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017. The amendments, made in December 2017, inserted a schedule dealing with penalty rates. The government indicating at the time that it could not support the bill in that form (see Bulletin 321).

An opposition bill to remove discrimination against students on the basis of their sexual orientation, gender identity or intersex status was debated over several days, but ultimately referred to a Legal and Constitutional Affairs committee inquiry for report by 11 February 2019.

On 18 October 2018, the Senate took the rare step of voting a bill down at the first reading stage, which is usually a formality (see Bulletin 329). The Senate took the same approach to another bill introduced by the same senator on 26 November.

Bills proposing different anti-corruption mechanisms, including an integrity commission and parliamentary standards commissioner, were introduced by crossbench members in each House and referred to Senate committees for inquiry. The reporting date of 5 April 2019 puts consideration of the bills beyond the likely final sitting day for the current parliament. Meanwhile, the House of Representatives informed the Senate by message on 26 November that it had agreed to the Senate's resolution calling for the establishment of an anti-corruption commission (see Bulletin 330).

Considering bills under a limitation of debate

The standing orders provide for a deliberate, staged process for the consideration of bills. It is open to the Senate to set that process aside by imposing a time limit for debate on specified bills, sometimes called a 'guillotine': see *Odgers' Australian Senate Practice*, under Limitation of debate - urgent bills.

The guillotine procedure under standing order 142 is technically available only to ministers, whose declaration that a bill is 'urgent' initiates the process. If the Senate agrees to a motion that a bill should be considered urgent, a minister may move to allocate time for debate. However, variants have developed over the past dozen years, allowing any senator to initiate 'time management' motions. Such motions may be initiated by leave, pursuant to notice, or after a suspension of standing orders. The allocation of time for debate is typically built in to the motion, which specifies that the procedures in so.142 apply.

Once in place, these arrangements may be overridden by a subsequent decision of the Senate to deal with a bill in a different way. So, for instance, a second reading amendment proposing to refer a bill to a committee (and thereby defer further consideration) is in order. A motion to vary or override a guillotine may also be initiated by leave or a suspension of standing orders.

Twice during the fortnight the Student Discrimination bill was subjected to a limitation of debate. On each occasion – as positions on the bill and proposed amendments evolved – that arrangement was overridden by a subsequent motion, prior to the time allocated for the debate expiring. The bill remains on the Notice Paper for the new year.

The government initiated a time management motion for a handful of its bills by leave on 5 December, which were passed with broad support. More combative proceedings ensued on the Home Affairs bill and the Assistance and Access bill, which were also determined under a limitation of debate.

The Home Affairs bill

Two crossbench senators proposed to attach an amendment about medical evacuations from regional processing centres to an otherwise uncontroversial bill dealing with miscellaneous matters in the Home Affairs portfolio. Senators McKim and Storer, by notice, initially proposed that the remaining stages of the bill be determined at the close of the sitting on 5 December, but later amended the motion to allocate time from 12.45 to 1.50pm on 6 December; the last scheduled sitting day for the year. Although time expired at 1.50pm, proceedings took almost 3 hours to complete.

Some of that time was taken up with debate and divisions on procedural motions. Shortly after time expired, two motions to suspend standing orders – respectively, to remove and to extend the time limit on the bill – were defeated, after debate truncated by closure. The President then applied earlier rulings against allowing repeated suspension motions to obstruct the will of the Senate (see Bulletin 326). Sometime later, a motion to suspend standing orders to temporarily adjourn the guillotine proceedings was carried, having secured an absolute majority, as required by so.209(1).

The remaining time was taken up with divisions on amendments. Under so.142(4), after the allotted time for debate expires, the question must be put on any amendment circulated at least 2 hours earlier. Amendments are considered ***en bloc***, unless senators indicate their intention to vote differently on them. Numerous amendments had been circulated, including three second reading amendments and several sheets of government amendments to the bill. The President was obliged to put the question separately on many of these amendments, as different senators indicated their intention to vote differently (including by abstaining) on different combinations of them. On the same basis, one second reading amendment required four votes; one for each paragraph.

The only successful amendments were those relating to medical evacuations. By the time the process was complete, however, the House of Representatives was on the cusp of adjourning for the year, so there was no chance for the Senate's amendments to be considered. Presumably the Senate's message will be reported to the House on its next sitting.

The Assistance and Access bill

A limitation of debate was also applied to the Assistance and Access bill, authorised by a suspension of standing orders. Standing order 142 was applied to the debate with a variation requiring that questions be put on amendments circulated 30 minutes or more before time expired, rather than the usual 2 hours.

Time was extended twice, by leave, before the Leader of the Government moved a second reading amendment to make the reference to the PJCIS referred to above. The Opposition withdrew its circulated amendments, before time expired. Leave would have been required to do so at a later stage. Senator Di Natale sought leave to take over the amendments, and later sought leave to commence moving them, which was refused. A suspension of standing orders to allow him to move the first of those amendments was also resisted, and amended to enable the Government Leader to move to finalise proceedings with a vote on the 'remaining stages' of the bill. Again, a suspension motion of this kind, moved without notice, requires the support of an absolute majority of senators.

There is inconsistent practice on the right to withdraw circulated amendments prior to time expiring. It has been accepted on several occasions that a senator may indicate – ***prior*** to time expiring – that they do not intend to proceed with certain amendments; that was the practice accepted here. However, this sits uneasily against the rationale given in Odgers for requiring leave to withdraw circulated amendments ***after*** time expires:

> In normal proceedings on bills a senator is not obliged to move an amendment which he or she has circulated, but when duly circulated amendments are put at the expiration of a time limitation, it is not open to a senator to withdraw a circulated amendment; to allow this could deprive senators who wished to vote for such an amendment of that opportunity. [14th ed. p. 354]

On this occasion, it was clear from the debate and votes in the Senate that the amendments did not enjoy broad support, and the bill proceeded without them.

Committee activity

On 29 November 2018, the Senate referred an inquiry into parliamentary scrutiny of delegated legislation to its Regulations and Ordinances Committee. The committee was established 86 years ago and the Senate considered it was appropriate to review the effectiveness, role and future direction of the committee as well as the adequacy of the existing framework for parliamentary control of delegated legislation. This is similar to a review undertaken by the Scrutiny of Bills committee which led to a number of recommendations to update the standing order which governs that committee's operation. The committee is due to report by 3 April 2019.

An unusual reference was made on 6 December, referring a post-implementation review of the recently-enacted ban on foreign electoral donations to the Joint Standing Committee on Electoral Matters that will be established in the next Parliament. The minister proposing the reference explained that the referral was by way of a Senate motion that has continuing effect into the next parliament.

As well as the usual collection of bills and other matters referred to committees for inquiry, there were a variety of reports tabled which underlined the capacity of Senate committees to respond to the different tasks delegated to them. For example, the Legal and Constitutional Affairs References Committee's inquiry into discrimination by faith-based educational institutions was referred on 13 November and finalised when the report was tabled on 26 November. In the intervening 13 days, the committee received 180 submissions and held one public hearing in Melbourne.

By contrast, the Rural and Regional Affairs and Transport References Committee concluded its 15 month inquiry into the integrity of the water market in the Murray-Darling Basin. This inquiry was referred to the committee on 16 August 2017, received 55 submissions and held 3 public hearings. The

Select Committee on Red Tape came to a conclusion with the presentation of its final report during the fortnight. This committee was established on 11 October 2016 and presented 9 interim reports before its final report.

And sometimes the subject matter under inquiry is emotionally charged. Reports from two such inquiries were also tabled during the fortnight. The Select Committee on Stillbirth Research and Education presented its report, with bereaved parents who had given evidence present in the public gallery. As well, the Community Affairs Reference Committee tabled its report into mental health services in rural and remote Australia, which also considered the prevalence of suicide in isolated communities. A full summary of committee activity for the fortnight is available here.

Orders for documents

Among the usual activity in relation to orders for the production of documents (as to which, see the cumulative online summary), were further proceedings in relation to Senate order 937, requiring the Commissioner of Taxation to provided designated information to the Economics Legislation Committee, including the names of companies in breach of certain tax laws. This order was refined and reiterated on 16 October and 26 November, but resisted on the grounds that disclosure of individual taxpayer information would harm the public interest by undermining confidence in taxation laws and administration.

A final iteration of the order, agreed to on 5 December, cautioned the Commissioner of Taxation that failure to comply with a lawful order of the Senate may be treated as a contempt.

Although the Senate may undoubtedly enforce such orders through its contempt powers, where disputes arise about PII claims, they are typically resolved through what have sometimes been referred to as 'political or procedural means'. This aspect of Senate practice was discussed in the 2014 Legal and Constitutional Affairs References Committee report, A claim of public interest immunity raised over documents (see paragraphs 2.14 – 2.17).

In this case, while the government continued to maintain its public interest immunity claim against the public disclosure of confidential taxpayer information, a compromise was reached, with the Commissioner undertaking to provide the documents to the committee, on the basis that the committee treats the documents as confidential, and agreeing to appear before the committee to provide in camera evidence.

On 5 December, the Trade Minister was required to make a statement to the Senate about the government's failure to comply with a continuing order of the Senate for the tabling of the text of bilateral and multilateral agreements at least 14 days before signing. That statement was duly debated.

RELATED RESOURCES

Dynamic Red – updated continuously during the sitting day, the Dynamic Red displays the results of proceedings as they happen.

Senate Daily Summary – a convenient summary of each day's proceedings in the Senate, with links to source documents.

Like this bulletin, these documents can be found on the Senate website: www.aph.gov.au/senate

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